LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1742~~ 70-200

UNION CARBIDE CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION

JACK P. SIMPSON
270 Park Avenue
New York, New York 10017

DAVID D. JOHNSON
JACKSON, KELLY, HOLT & O'FARRELL
1601 Kanawha Valley Building
Charleston, West Virginia 25321

Attorneys for Petitioner

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1742

UNION CARBIDE CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent's brief in opposition to the petition for a writ of certiorari raises for the first time two arguments to which your petitioner feels a reply should be made. Respondent first argues that there is no conflict between the circuits because the decisions cited by Petitioner as being in conflict with the decision of the Court of Appeals in this case are factually distinguishable or have been "rejected" by later decisions. (Res. Br., p. 7, n. 3). Respondent's second new argument is that the Board found as a fact that "had the employees not been unlawfully discharged, their jobs would have

continued" (Res. Br. p. 8), and that there arises no question of law as to whether the Court properly ordered the employees' re-instatement with back pay despite the Company's uncontroverted evidence that it had no need for the employees' services at the end of the strike. Both arguments are without merit.

ARGUMENT

I. THERE IS A REAL CONFLICT BETWEEN THE CIRCUITS

Petitioner cites *NLRB* v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (7th Cir.) cert. den'd 342 U.S. 885, and *NLRB* v. *L. G. Everist, Inc.*, 334 F.2d 312 (8th Cir.), as representing its side of the conflict between the circuits on the first question presented by the petition (Pet. p. 2, 5). Respondent argues that *Everist* is distinguishable, in that the picketing there occurred on the premises of another employer, and that this distinction is significant because "employees in this situation are more vulnerable to discharge by their employer, because the mutuality of their interest and that of the strikers is more remote." (Res. Br., p. 8). It is urged by petitioner that this argument does not bear analysis. The mutuality of interest between strikers and workers asked to cross their picket lines is not a function of the location of the picket line. Quite often, unions representing different groups working for the same employer are in competition for membership or the employer's labor dollars. Likewise, nonstriking workers often have interests in common with striking employees of a different employer. The facts in this case are that Moss and Withrow, as the discharged employees in *Everist*, had no direct interests in common with the strikers. Therefore the "distinction" asserted between *Everist* and this case is without significance.

Respondent asserts that *Illinois Bell* is distinguishable in that the discharged employees there were members of a labor union, and that the refusal to cross the picket line was, in that case, "in defiance of their union representative." (Res. Br., p. 7, n. 3). The fact in *Illinois Bell* was merely that the employees' actions were not organized and approved by their union; and this fact was pointed out by the Court of Appeals for the Seventh Circuit to emphasize that the employees who refused to cross the picket line were not serving any legitimate purpose of their own. As the Court said:

> "* * * such refusal was not for the mutual aid or protection of the employees involved. It could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees and, consequently, could have obtained nothing from respondent for their benefit."

That is the exact circumstance in this case. The "distinction" pointed out by Respondent has no significance.

Finally, Respondent argues that *Illinois Bell*, to the extent that it holds that employees who refuse to cross a picket line out of principle do so as a personal matter rather than in concert with each other, has since been "rejected" by the Seventh Circuit Court of Appeals in *NLRB* v. *John S. Swift Co.*, 277 F. 2d 641 (7th Cir.). In *Swift* the charging parties "respected" a picket line of employees who were discharged by their common employer for refusal to work overtime, and were held to have done so to protest that discharge. Obviously the employees in that case did not honor the picket line out of personal principle, but did so with the object of seeking the re-employment of fellow members of their

own bargaining unit who had been discharged for violation of a rule which affected not only the pickets, but also those who honored the picket line. A simple reading of *Swift* shows that it casts no doubt upon the continuing authority of *Illinois Bell* as representing the Seventh Circuit's position in a case such as the instant case.

II. THE PROPRIETY OF THE BOARD'S ORDER GRANTING REINSTATEMENT WITH BACK PAY IS A QUESTION OF LAW

Respondent argues that there is no reviewable question as to the propriety of the Board's Order granting reinstatement with back pay, because the Board allegedly made a "finding of fact" that "had the employees not been unlawfully discharged, their jobs would have continued." Petitioner submits that the Board's Order, enforced by the Court of Appeals, granting reinstatement with back pay, does not depend upon the resolution of any question of fact, but upon a conclusion as to the law applicable to the undisputed facts. The Court of Appeals correctly found that "the basic facts are not in dispute." (Petition. App. p. 2a). The basic and uncontroverted facts are that upon the termination of the employment of Moss and Withrow the petitioner absorbed their working duties into the remaining work force. At the conclusion of the strike Petitioner had no need for Moss' and Withrow's services, as the work previously performed by them was being performed by other employees and the work demands of the Petitioner were continuing to decline. The Board and the Court of Appeals held, nevertheless, that because the Petitioner had not hired replacements for Moss and Withrow at the time of their discharge, but had absorbed

their work into the remaining work force during a time of declining overall work demands, the Petitioner had placed itself "in the untenable position of contending that the illegal discharges of July, 1967, provided an economic justification for refusal to reinstate the employees in October, 1967." (Pet. p. 6a, 7a).

The last above quoted holding of the Board and the Court of Appeals rests upon a distinction, between discharge and replacement, and between replacement and absorption, which has no basis in either fact or law. In the words quoted by Judge Bryan, from *NLRB* v. *Fleetwood Trailer, Inc.*, in his dissent in this case, such a holding in the context of these facts, "puts too fine a point" upon the difference between discharge and replacement, and replacement and absorption of the remaining work. (Pet. App. p 7a). Under the rationale of the Board and the Court of Appeals in this case, reinstatement and back pay would have been denied Moss and Withrow had the Petitioner replaced them with new employees, instead of discharging them and having their work absorbed by the remaining employees. Petitioner submits that the distinction thus made by the Board and the Court of Appeals should be held invalid. To so hold, it is not necessary that this Court overturn any finding of fact made by the Board; but only that it reject the Board's and Court of Appeal's conclusion of law based upon the aforementioned invalid distinction.

CONCLUSION

For the reasons set forth in its petition, which, as shown above, have not been materially contested by Respondent, the petition for certiorari should be granted.

Respectfully submitted,

JACK P. SIMPSON
270 Park Avenue
New York, New York 10017

DAVID D. JOHNSON
JACKSON, KELLY, HOLT &
O'FARRELL
1601 Kanawha Valley Building
Charleston, West Virginia 25321

Attorneys for Petitioner

CERTIORARI
DENIED
N.C.R.